United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7289

To be argued by
L. Kevin Sheridan

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BERNARD FRIED,

Plaintiff-Appellant,

-against-

ROBERT O. LOWERY, Commissioner JOHN T. O'HAGAN of the Fire Department, THOMAS J. HARNETT, JAMES T. WARD, JOHN V. SCHNEIBLE, CARMINE DeANGELES, EGEDIO E. ASINELLI, DR. GABRIEL SELEY, DR. SEYMOUR CUTLER, DR. JACQUES GABRILOVE, DR. JOHN F. CONNELL, NICHOLAS J. REINHARDT, FRANK KILKENNY, VICTOR ANSORGE,

(Additional names appear on next page)

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF THE MUNICIPAL DEFENDANTS

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On Appeal from the United States District Court
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BRIEF OF THE MUNICIPAL DEFENDANTS-APPELLEES

PRELIMINARY STATEMENT

This is an appeal from an order of the United

States District Court for the Eastern District of New York (Platt, J.), dated April 11, 1975, which dismissed the amended complaint herein. Pursuant to an order of this Court dated September 2, 1975, the pro se appellant was granted leave to proceed on 6 typewritten briefs and to dispense with a printed appendix.*

This action arises out of appellant's forced retirement on ordinary disability in 1968 from the New York City Fire Department, by which he had been employed as a tenured civilian employee. Following his retirement, which took place in July, 1968, appellant, in September of 1968, commenced a proceeeding in the New York Supreme Court pursuant to Article 78, CPLR, challenging his retirement. On February 21, 1969, the petition in that proceeding was dismissed by Mr. Justice Gold. A notice of appeal was filed but the appeal was never perfected.

Subsequently, appellant brought an action in the New York Supreme Court wherein he again claimed that he had been wrongfully retired and, in addition, claimed that his retirement benefits were improperly computed.

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* Notwithstanding he was granted leave to dispense with a printed appendix, appellant has attached to his brief an appendix, which, however, is quite incomplete, in that it does not even include a copy of appellant's "Supplemental Complaint." That complaint is included in the record on appeal docketed with this court. Because of its length (in excess of 70 pages), we have not attached that document as an appendix to this brief.

In April of 1973 so much of the complaint in that action as claimed that appellant was wrongfully retired was dismissed by Mr. Justice Gellinoff on the ground that this claim was barred by the doctrine of res judicata. That portion of plaintiff's action for money damages based on an alleged incorrect computation of benefits is presently pending in the New York State Supreme Court.

Thereafter, on February 8, 1974, appellant filed in the United States District Court for the Eastern District of New York a complaint naming as defendants the following: "Fire Deprtment; City of New York Employees Retirement System; Queens General Hopsital; Comptroller, City of New York; Corporation Counsel; Board of Estimate; Supreme Court, New York County; County Clerk, New York County" (Complt. 74C 219, E.D.N.Y.).

By "Memorandum of Decision and Order" dated October 22, 1974, Judge Platt held, on the motion of the municipal defendants, that that complaint should be dismissed, predicated primarily upon the ground of municipal immunity from suit under Section 1983 (citing Monroe v. Pape, 365 U.S. 167 (1961), and City of Kenosha v. Bruno, 412 U.S. 507 (1973)). With respect to appellant's claim of a conspiracy between the various state and city officials, the District Court held that the complaint was insufficient under this Court's decision in Powell v. Workmen's Compensation Board of the State of New York, 327 F. 2d 131 (2d Cir. 1964), in that it failed to allege

with particularity overt acts of the defendants which were reasonably related to promotion of the claimed conspiracy.

The District Court did not reach the question of the municipal defendants' contention that the appellant's claim of wrongful retirement was barred by the doctrine of res judicata. Cf. Lombard v. Board of Education of the City of New York, 502 F. 2d 631 (1974), cert. denied, 420 U.S. 976 (1975), which decision may be the subject of reconsideration on the en banc reconsideration of Brault v. Town of Milton, _____ F. 2d _____ (2d Cir. 1975), petition for en banc reconsideration granted by order dated April 17, 1975 (Docket No. 74-2370).

The District Court dismissed the original complaint herein without prejudice to appellant's filing an amended complaint within 60 days, with the court "strongly recommending" that appellant "obtain counsel to enable him to draw a proper complaint."

The amended complaint (hereinafter also "complaint"), dismissal of which is here in issue, was filed December 16, 1974. In it plaintiff indicates that it was drafted without the assistance of counsel (Complaint, page 2). The caption lists as defendants approximately 40 past and present City officials or employees, two New York Supreme justices and the County Clerk of New York County (like the state judges, a state employee, represented herein by the Attorney General of the State of New York). Listed

among the defendants named in the caption of the complaint are Adrian P. Burke, the then Corporation Counsel of the City of New York, and certain other past and present City officials against whom plaintiff seeks relief, but who are not named in the body of the complaint, and who are apparently sued only in their official capacities.

By way of relief, plaintiff seeks, inter alia, reinstatement, with adjusted back pay, or, in the alternative $1,000,000 in damages (Complaint, par. 38).

On motion brought by the state and municipal defendants, on which the Corporation Counsel raised the failure of the District Court to properly acquire jurisdiction of the person of certain of the municipal defendants, as well as arguments for dismissal on grounds of statute of limitations and res judicata, as well as failure to state a cause of action, the District Court entered an order of dismissal, apparently intended as a final order of dismissal barring the filing of a further amended complaint. In dismissing this complaint the District Court issued no opinion.

Issues Presented

In his amended complaint, read together with its attached exhibits, the plaintiff does, we concede, set forth facts which arguably would support his contention in his brief that, at least by today's standards of due

process, his forced retirement from his tenured position with the Fire Department was improper. Not only was the reason for his retirement somewhat stigmatizing ("paranoid type personality") but also he was removed from his tenured position, in which he had a property right, wihout an adversary hearing (although the answer to this latter contention might be that the statutory scheme pursuant to which he enjoyed a property right in his position expressly provides for such forced retirement). At the very least, we would concede, were this action not otherwise barred, it would have been error, in the face of these considerations, for the District Court to have dismissed the amended complaint in its entirety without leave to replead.

Similarly, we would concede that plaintiff's contention that his forced retirement resulted from a conspiracy entered into by Fire Department employees in reprisal for actions taken by him, which we would urge is not here alleged with sufficient particularity, probably would not, without more, be properly dismissible without leave to replead.

It is, however, our position that this amended complaint was properly dismissible in its entirety without leave to replead on two grounds: res judicata and statute of limitations. In an attempt to avoid both of these bars, plaintiff in his amended complaint has attempted to portray himself as the victim of a thoroughly implausible, single

continuing conspiracy, extending from prior to his retirement in 1968 to the early 1970's, and including as alleged conspirators not only the various Fire Department and Retirement System defendants named herein but also, of necessity, two state judges, the New York County Clerk and various attorneys in the office of the Corporation Counsel whose only connection with plaintiff and the alleged conspiracy to retire plaintiff has consisted of their participation in earlier lawsuits brought by plaintiff. As to these conspiracy allegations, it is our position that they are not only pleaded with insufficient particularity to survive a motion to dismiss but are so patently frivolous as to justify dismissal with prejudice.

With respect to our claim that this action is barred by the doctrine of res judicata, we will not brief that issue here. It is our understanding that this Court's decision in Lombard v. Board of Education of the City of New York, supra, may be reconsidered on the en banc reconsideration of Brault v. Town of Milton, supra. If on such reconsideration Lombard is overruled, that would furnish an additional basis for affirmance of the District Court's action in this case.

With respect to our contention that this action is time barred, it is our position that, once it is determined that plaintiff's allegations about the participation of the state defendants and the City attorneys in the alleged conspiracy are held to be insufficient, it must be held

that the period of limitations began to run with plaintiff's retirement in July, 1968, and, accordingly, the action is barred as against all other defendants under the applicable state statute of limitations (see Johnson v. Railway Express Agency, Inc., _____ U.S._____ (May 19, 1975), 43 U.S.L.W. 4623; Ortiz v. LaVallee, 442 F. 2d 912, 914 (2d Cir. 1971)), which, at best, would be the three year statute of limitations provided for in CPLR 214 (2) (Ortiz v. LaVallee, supra; Kaiser v. Cahn, 510 F. 2d 282, 284-285 (2d Cir. 1974).*

FACTS

As indicated earlier, it is plaintiff's contention that the conspiracy which had as its original purpose the securing of his forced retirement ripened into a larger

*It is not necessary to decide this issue on this appeal, but we would urge that as against any defendant sued in his official capacity where the gravamen of the complaint is such that in state court the matter would properly be brought in the form of an Article 78 proceeding and the relief granted would, in effect, be granted against the City, the applicable period of limitations would be the four month period provided for in CPLR 217. In Swan v. Board of Higher Education of the City of New York, 319 F. 2d 56 (2d Cir. (1963), it was suggested (319 F. 2d at 60) that such a relatively short period of limitations might not be permissible, as "confiscatory", but in view of the Supreme Court's upholding in Johnson v. Railway Express Agency, supra, a relatively short state statute of limitations (one year) and its treatment of the issue there, that case is persuasive authority that the "confiscation" argument would not prevail in that Court, but rather if the New York courts would apply CPLR 217 in this context, the federal courts should follow suit. That New York courts would apply CPLR 217 in the case of a discharged public employee seeking reinstatement is, we submit, beyond any reasonable doubt - whatever the source of the petitioner's right to relief.

conspiracy, involving two state judges, the New York County Clerk and various City lawyers, to obstruct justice (complaint, pars. 4-6).* The gist of his complaint insofar as it relates to the post-retirement conspiratorial activities is as follows:

In connection with his attempt in his second state proceeding (before Mr. Justice Gellinoff) to defeat the City's motion to dismiss so much of that action as was based on plaintiff's alleged wrongful discharge, plaintiff went to the New York County Clerk's office and there was unable to obtain the file containing the papers on his earlier Article 78 proceeding before Mr. Justice Gold. Based upon this, plaintiff claims (par.1) that the file "was suppressed by a person or persons unknown to [plaintiff]." But see complaint, par. 30, where plaintiff speculates that Assistant Corporation Counsel Tobias "may have" suppressed this file. "As a direct result of the [fraudulent] suppression" Mr. Justice Gellinoff invoked the doctrine of res judicata against plaintiff (par. 2; see also, par. 31).

On the basis of these events, plaintiff alleges (par. 4) that "It would therefore appear that there may have been collusion by and between the judiciary or staff and the assistant corporation counsel named as a defendants [sic]...." Plaintiff does not state when the alleged

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* There is no paragraph "3".

suppression or collusive agreements took place, but presumably it is claimed to have taken place sometime shortly before Mr. Justice Gellinoff's decision on the City's motion to dismiss that part of plaintiff's complaint in that action which related to plaintiff's alleged wrongful retirement, which motion was granted in 1973.

Plaintiff also suggests that Mr. Justice Gellinoff may have in some respects erred in his handling of this motion ("failure to take judicial notice, of the violation of Rule 35 [F.R.C.R.]" [par. 5]; "accepting hearsay information from Mr. Tobias" concerning the contents of the Article 78 proceeding file [par. 31]). And, similar charges of legal error are also made against Mr. Justice Gold (par. 24). But, in fact, no direct charge of any actual wrongdoing by either Mr. Justice Gold or Mr. Justice Gellinoff is made anywhere in the amended complaint.

Over and above plaintiff's suggestion that Assistant Corporation Counsel Tobias "may have" suppressed the Article 78 proceeding file, if indeed it was suppressed, rather than being unavailable for some other reason, plaintiff's only other complaint about City attorneys is that defendants Herzog and Tobias "handled" the case of Fried v. City in a "unilateral and autocratic manner" (par. 30) and in that case "[a]n admission was made by Mr. Tobias that a sum of at last $800.00 had been withheld from [plaintiff]" (par. 32).

There is no claim made in the amended complaint

that the City attorneys, the state judges or the County Clerk knew any of the participants in the earlier conspiracy to retire plaintiff, nor is there any suggestion that any of these individuals would have any personal animus against or motive to injure the plaintiff except insofar as Herzog and Tobias were "unilateral and autocratic" and Tobias "may have" suppressed the Article 78 proceeding file, if indeed it was suppressed.

ARGUMENT

PLAINTIFF'S ATTEMPT TO PORTRAY THE STATE DEFENDANTS AND THE CITY ATTORNEYS AS PARTIES TO AN EARLIER FORMED CONSPIRACY TO FORCE HIS RETIREMENT IS PATENTLY FRIVOLOUS. ACCORDINGLY, THE COMPLAINT IS ALTOGETHER INSUFFICIENT AS TO SUCH DEFENDANTS AND IS TIME BARRED AS TO THE OTHER DEFENDANTS.

Very recently, Judge Pollack had occasion to note that it is "not uncommon for a disappointed litigant to bring a subsequent action [charging that] virtually every person in authority" having anything to do with his claim was guilty of "prejudice or misconduct." Boruski v. Stewart, 381 F. Supp. 529, 535 (S.D.N.Y. 1974). That is precisely what has occurred here, with plaintiff having charged that two respected state judges, the New York County Clerk and various City attorneys all became parties to a mean, vicious conspiracy to injure plaintiff. One can reasonably expect that in the next round of this fight the named defendants will include Judge Platt, the City attorneys defending this

suit and the members of the panel of this court who will hear the appeal (unless they should vote to reverse).

Plaintiff's allegations of an earlier conspiracy to force his retirement are themselves woefully insufficient. His purpose in trying to tie these defendants into such alleged earlier conspiracy is painfully obvious; his attempt to achieve this purpose is pitifully unsuccessful. His allegations are patently insufficient to show any participation by these defendants in any conspiracy, much less to show their having joined an earlier conspiracy whose original purpose was his forced retirement. Indeed, even accepting all that plaintiff says about that earlier conspiracy and its alleged participants, that conspiracy would have ended with the achievement of its purpose, to wit: plaintiff's retirement.

Very simply, plaintiff's allegations of conspiracy by these defendants are totally inadequate. Cf. Powell v. Jarvis, 460 F. 2d 551 (2d Cir. 1972); Powell v. Workman's Compensation Board of the State of New York, 327 F. 2d 131, 137 (2d Cir. (2d Cir. 1964); 900 G.C. Affiliates, Inc. v. City of New York, 367 F. Supp. 1 (S.D.N.Y. 1973). Compare Birnbaum v. Trussel, 371 F. 2d 672 (2d Cir. 1966) (Section 1983 conspiracy complaint sufficiently alleged where the allegations, if accepted as true, showed both a specific motive on the part of at least some of the alleged conspirators to injure the plaintiff and at least some reasonable possibility dismissal could have resulted from the alleged conspiracy).

Clearly, we submit, this complaint is patently insufficient and frivolous insofar as it attempts to show any conspiratorial activity or participation on the part of the State defendants and the City attorney defendants. Plaintiff has already been given one opportunity to replead his claim of conspiracy. To the extent that he even here charges these defendants with any actionable wrongdoing, it would appear "beyond doubt that he can prove no set of facts [against these defendants] which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); cf. Blassingame v. United States Attorney General, 387 F. Supp. 418, 420 (S.D.N.Y. 1975). Accordingly, on this ground the complaint should be dismissed against such defendants, and as against the other defendants it should be dismissed as time barred.

CONCLUSION

The order appealed from should be affirmed, with costs.

October 2, 1975

Respectfully submitted,

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Corporation Counsel,
Attorney for
Municipal defendants-
Appellees,

L. KEVIN SHERIDAN,
of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Carlos M Rodriguez being duly sworn, says that on the 2 day of Oct 19 75 he served the annexed Brief of Municipal Defendant upon Bernard Fried Esq., the attorney for the Plaintiff-Appellant herein by depositing 3 copies ~~a copy~~ of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 38-11 Elmhurst Ave in the Borough of Elmhurst, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 2 day of Oct 19 75

Miriam Mulberg
Commissioner of Deeds
City of New York - No. 3-1999
Commission Expires July 1, 1977

Carlos M Rodriguez

Form 323-40M-703823(73) 346

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